

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ALCATEL-LUCENT USA, INC.,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 6:09-CV-422 (LED)
	§	
AMAZON.COM, INC., et al.	§	
	§	
Defendants.	§	

**DEFENDANTS' OBJECTIONS TO ALCATEL'S USE OF DEPOSITION TESTIMONY
FROM ITS EXPERT JOHN HAUSER**

Defendants¹ file these Objections ("Defendants' Objections") to Plaintiff Alcatel-Lucent USA, Inc.'s ("Alcatel") Use of Deposition Testimony from its retained expert John Hauser ("Hauser") in place of bringing Hauser to testify live at trial.

1. Hauser is one of Alcatel's retained expert witnesses related to alleged damages. On August 23, 2011, Alcatel designated deposition testimony from Hauser for use at trial, indicating that Hauser would not be appearing live at trial. However, Alcatel has not provided any evidence showing that Hauser is unavailable to testify live at trial. *Hegwood v. Ross Stores, Inc.*, No. 3:04-cv-2674, 2007 U.S. Dist. LEXIS 2887, *4 (N.D. Tex. Jan. 16, 2007) ("The burden of establishing the unavailability of a witness or exceptional circumstances rests with the party seeking to introduce the deposition." (citing *Jauch v. Corley*, 830 F.2d 47, 50 (5th Cir. 1987))). Accordingly, Alcatel should be prohibited from using Hauser's deposition testimony in place of

¹ "Defendants" refers collectively to Amazon.com, Inc.; Zappos.com, Inc.; Netflix, Inc.; Overstock.com, Inc.; Sears Holdings Corporations; Sears Holdings Management Corporation; Sears, Roebuck and Co.; Sears Brands, LLC; Kmart Corporation; Kmart Holding Corporation; Lands' End, Inc.; Newegg Inc.; and Magnell Associate Inc. d/b/a Newegg.com.

bringing Hauser live to testify at trial.² See FED. R. CIV. P. 32(a)(4); *Rivera-Davila v. Asset Conservation, Inc.*, No. 98-1075, 2000 U.S. App. LEXIS 479, *21-22 (Fed. Cir. Jan. 12, 2000) (excluding the deposition testimony of a party's expert witness because the offering party did not prove the expert's unavailability).

2. The fact that Hauser resides over 100 miles from the trial location does not render him unavailable under Rule 32(a). Indeed, by selecting an expert who resides more than 100 miles away, Alcatel improperly attempts to procure Hauser's absence for the purposes of Rule 32. See FED. R. CIV. P. 32(a)(4)(B) (A witness is unavailable if "the witness is more than 100 miles from the place of hearing or trial..., *unless it appears the that the witness's absence was procured by the party offering the deposition.*"); *Aubrey Rogers Agency, Inc. v. AIG Life Ins. Co.*, No. 97-529, 2000 U.S. Dist. LEXIS 997, *19 (D. Del. Jan. 13, 2000) ("***By selecting an expert [who resides over 100 miles from the trial], [Plaintiff] 'procured' that expert's absence from this Court[.]***"). Moreover, the trial court has wide discretion in choosing whether to admit deposition testimony under Rule 32, and "may consider all the circumstances relating to the party's absence to determine whether the deposition may be used." *Garcia-Martinez v. City & County of Denver*, 392 F.3d 1187, 1191-92 (10th Cir. 2004) (citation omitted).

3. Alcatel, a corporation headquartered in Delaware, chose to file this lawsuit in the Eastern District of Texas. Alcatel then chose to hire an expert, who Alcatel knew at the time resided over 100 miles from the location of trial, thus procuring his "absence." *Aubrey Rogers Agency*, 2000 U.S. Dist. LEXIS 997, at *17-18 ("[U]nlike fact witnesses, who are determined by their personal knowledge of relevant facts, regardless of where they live or work, a party

² Alcatel, however, would still be able to use Hauser's video deposition testimony to "contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence." FED. R. CIV. P. 32(a)(2).

normally has broad latitude in selecting its expert witnesses." (quoting *Caron v. General Motors Corp.*, 643 N.E.2d 471, 474 (Mass. App. 1994))). Allowing Hauser's deposition testimony at trial would undermine the intent and policy of Rule 32, and reward Alcatel's litigation antics. Indeed, allowing a party to present its expert's deposition testimony instead of calling him live at trial solely because the party chose to hire a distant expert sets dangerous precedent and abrogates the intent and spirit of the federal rules. See *Aubrey Rogers Agency*, 2000 U.S. Dist. LEXIS 997, at *15 ("[J]udges have discretion to exclude depositions of expert witnesses where the party proponent has selected a distant expert and has not made reasonable efforts to assure the expert's presence at trial." (citations omitted)).

4. Moreover, federal common law and the Federal Rules of Civil Procedure demonstrate a strong preference for live testimony at trial over deposition testimony. Indeed, in its notes to Federal Rule of Civil Procedure 43, the Advisory Committee stated, "***The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.***" FED. R. CIV. P. 43, Notes of Advisory Committee on 1996 amendments; see also *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529, 536 (2d Cir. 1972) ("It must be recognized that the general preference of the federal rules, as expressed in F.R.Civ.P. 43(a), is for oral testimony so that there will be an opportunity for live cross-examination and observation of the demeanor of the witness."). Allowing paid out-of-state experts to evade trial under the guise of unavailability stands in direct contrast to the text and policy of the Federal Rules of Civil Procedure.

5. Hauser's deposition testimony should also be excluded under Federal Rule of Civil Procedure 26(b)(4). Defendants' deposition of Hauser was intended to explore Hauser's

opinions and methodology. It was not an effective opportunity to cross-examine Hauser on his credibility and reliability; that is the purpose of live testimony at trial. The drafters of Rule 26 specifically recognized that in cases presenting intricate and difficult issues, such as patent cases, where expert testimony is likely to be determinative, "[e]ffective cross-examination of an expert witness requires advanced preparation. The lawyer even with the help of his own experts frequently can not anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand." FED. R. CIV. P. 26, Notes of Advisory Committee on 1970 amendments, Note to Subdivision (b)(4) – Trial Preparation: Experts. Therefore, proper preparation for cross-examination of an expert is necessary. Allowing Hauser to forgo testifying at trial would unfairly prejudice Defendants by eliminating their opportunity to properly cross-examine him. For the foregoing reasons, Alcatel should be prohibited from presenting Hauser's deposition testimony rather than bringing Hauser live to testify at trial.

Dated: August 30, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record via electronically pursuant to the Federal Rules of Civil Procedure on the 30th day of August, 2011.

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CERTIFICATE OF CONFERENCE

The undersigned certifies that counsel for Overstock and Alcatel conferred via telephone conference on August 30, 2011 regarding Defendants' objections to Alcatel's use of deposition testimony from John Hauser at trial, and Alcatel's counsel opposed Defendants' Objections to Alcatel's Use of Deposition Testimony from its Expert John Hauser.

/s/ John H. Barr, Jr.
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